



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

January 16, 1995

Ms. Terry G. Salem  
Staff Attorney  
Legal Division  
Texas Natural Resource Conservation Commission  
P.O. Box 13087  
Austin, Texas 78711-3087

OR95-003

Dear Ms. Salem:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. We assigned your request an identification number, ID# 27235.

The Texas Natural Resource Conservation Commission (the "TNRCC") has received a request for "answers" and documentation relating to the "Contract for the Motor Vehicle Inspection/Maintenance Program" that the TNRCC and Tejas Testing Technology Two, L.C. ("Tejas") executed in 1993. Specifically, the requestor seeks ten "answers" or types of documentation:

1. Please list the Data or facts compiled or obtained by Tejas and/or [the TNRCC's predecessor, the Texas Air Control Board (the "TACB")] concerning the anticipated number of vehicles subject to vehicle inspection in the Dallas/Fort Worth Region pursuant to the "CONTRACT"; and
2. Please list the source of the data or facts used in determining the number of vehicles in the Dallas/Fort Worth Region, subject to inspection; and
3. Please state the actual formula or computation or method, including all variables, used in determining the number of contractors inspection sites and location of contractors inspection sites in the Dallas/Fort Worth Region, to inspect all vehicles in the Dallas/Fort Worth Region; and

4. Please state the source or from where the actual formula or computation or method, including all variables, was obtained by "TEJAS" and/or "TACB"; and
5. Please list the street address of each existing site or property anticipated to be purchased for contractors inspections sites, specifically listing those contractor inspection sites (already purchased or anticipated to be purchased) in Dallas County that are North of Interstate 20 and those South of interstate 20 in Dallas County; and
6. What person(s) or entity(s) have given the contractor approval for the number and specific locations of contractors inspection sites, listed in #5 above, in the Dallas/Forth Worth Region; and
7. Please list the source of the data or facts used in determining the number of vehicles in the Dallas/Fort Worth Region, subject to inspection; and
8. Please state the actual formula or computation or method, including all variables, used in determining the contractor inspection site convenience and or location to each vehicle owner subject to inspection in the Dallas/Fort Worth region; and
9. Please state the actual formula or computation or method, including all variables, used in determining the contractor inspection site convenience and or location to each vehicle owner subject to inspection in the Dallas County region, if different tha[n] your answer to #8 above; and
10. With reference to your answer to #6 above, what data, facts and formula, and computation, and method did that or those person(s) or entity(s) consider in accepting the number and location of contractors inspection sites in the Dallas/Fort Worth Region, as being sufficient of the managing contractors obligation to design and construct a network of vehicle emission inspection facilities of sufficient number, size and capacity to meet the "CONTRACT" requirements.

Initially, we note that some of the items the requestor seeks, such as items 2, 4, 6, and 7, appear to require an answer instead of documentation already in the possession of the TNRCC. The Open Records Act does not require a governmental body to answer factual questions, Open Records Decision No. 555 (1990) at 1, nor does it require a governmental body to compile or prepare new information, Open Records Decision

No. 605 (1992) at 2. Accordingly, to the extent that the items requested require the TNRCC to answer a question or compile or prepare new information, the TNRCC need not do so.<sup>1</sup> On the other hand, of course, the TNRCC must make a good-faith effort to relate a request to information in its possession. See Open Records Decision No. 561 (1990) at 8.

You believe that the requested information contains information that the TNRCC may withhold pursuant to sections 552.104, 552.105, and 552.110 of the Government Code. Section 552.104 applies only during the pendency of a particular competitive bidding situation, however; it is inapplicable when the bidding on a contract has been completed and the contract is in effect. *E.g.*, Open Records Decision Nos. 541 (1990) at 5; 514 (1988) at 2; 319 (1982) at 3. You inform us that the contract between the TNRCC and Tejas is in effect. Accordingly, section 552.104 does not apply.

Section 552.105 of the Government Code excepts from required public disclosure information relating to

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Section 552.105 protects a governmental body's planning and negotiating position with respect to a particular transaction. Open Records Decision No. 564 (1990) at 2 (citing Open Records Decision Nos. 357 (1982); 222 (1979)).

In Open Records Decision No. 265 (1981) this office considered whether the statutory predecessor to section 552.105 of the Government Code, formerly V.T.C.S. art. 6252-17a, § 3(a)(5), authorized a governmental body to withhold information relating to the site of a proposed waste treatment plant. Open Records Decision No. 265 (1981) at 1. At the time of the request for the information, a private company, Big Chief Environmental Services, Inc., was negotiating, on behalf of the Gulf Coast Waste Disposal Authority, for the purchase of the proposed site. *Id.* The decision concluded that the statutory predecessor to section 552.105 authorized the Gulf Coast Waste Disposal Authority to withhold information that would reveal the proposed location of the waste treatment plan, but only until the purchase was finalized. *Id.* at 2. Upon the completion of the purchase, the statutory predecessor to section 552.105 no longer authorized the governmental body to withhold the information. *Id.* We likewise conclude here that section 552.105 authorizes TNRCC to withhold information revealing proposed sites that Tejas currently is negotiating to purchase.

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<sup>1</sup>However, the TNRCC may answer the questions if it desires to do so.

Section 552.110 protects the property interests of private persons by excepting from required public disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. We have received arguments from Tejas, claiming that portions of the information in its proposal constitute trade secrets.<sup>2</sup> Accordingly, we need address only the trade secret branch of section 552.110.

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business, . . . [but] a process or device for continuous use in the operation of the business . . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). The Restatement lists six factors we must consider when determining whether particular information is a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the

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<sup>2</sup>In a case in which the release of requested information may implicate the privacy or property interests of a third party, section 552.305(a) of the Government Code authorizes a governmental body to decline to release the requested information for the purpose of seeking a decision from the attorney general. The governmental body is not required in such a case to submit its reasons why it may withhold or release the requested information. Gov't Code § 552.305(c). The person whose interests may be implicated may submit to the attorney general its reasons why the governmental body may release or withhold the information. *Id.*

Consistent with section 552.305, you have refrained from arguing why section 552.110 applies or does not apply to the requested information. Instead, you asked that we contact a representative of Tejas.

information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

*Id.*; see also Open Records Decision Nos. 319, at 2, 306, at 2 (1982); 255 (1980) at 2.

If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we must accept a private person's claim that the information is a trade secret so long as the person establishes a prima facie case for the exception and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5. On the other hand, when an agency or company fails to provide relevant information regarding factors necessary to make a claim under section 552.110, a governmental body has no basis for withholding the information under section 552.110. See Open Records Decision No. 402 (1983) at 2.

Tejas contends that the requestor seeks trade secret information insofar as he seeks information regarding the methodology Tejas and its parent company, Systems Control, Inc., used to develop a network of inspection stations, to select inspection station locations, and to determine anticipated demand for inspection services within a given area. In particular, Tejas has identified sections 4 and 5 of its proposal, which relate to network design and site selection, as trade secret information, as well as information relating to its demand models and queuing programs. In support of its claims, Tejas has presented detailed information pertinent to the six indicia of trade secret information listed in the Restatement.

We have reviewed the information you have submitted. See Gov't Code § 552.303 (requiring governmental body that requests attorney general decision on open records request to supply to attorney general specific information requested). We agree that the information contained in sections 4 and 5 of the proposal constitutes trade secret information; the TNRCC may, therefore, withhold the information.<sup>3</sup> Neither you nor a representative of Tejas definitively has designated the information Tejas describes as trade secret information relating to its demand models and queuing programs. While we believe Tejas has established its prima facie case that this information is trade secret and that the TNRCC may withhold the information, we are unable to evaluate whether particular records contain this kind of trade secret information because the records have

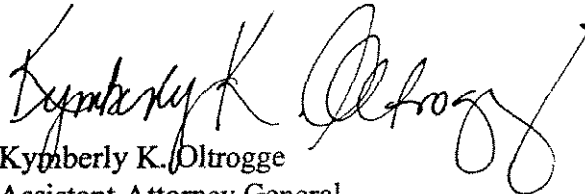
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<sup>3</sup>Some of the information in sections 4 and 5 of the proposal relate to sites that Tejas already has purchased. Tejas does not object to the release of street addresses of inspection stations the location of which TNRCC finally has approved and the purchase of real estate for which Tejas has completed. Moreover, as we have already concluded, section 552.105 does not authorize the TNRCC to withhold information relating to the location of real property once the purchase is completed. The TNRCC must release this information to the requestor.

not been marked or specifically identified. We therefore ask that you mark the documents in accordance with this decision and, within ten days of the receipt of this letter, return the marked documents to us for our review.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

  
Kimberly K. Oltrogge  
Assistant Attorney General  
Open Government Section

KKO/LRD/rho

Ref.: ID# 27235

Enclosures: Submitted documents

cc: Mr. David F. Vedral  
First Interstate Bank Building  
5801 Marvin D. Love Freeway, Suite 301  
Dallas, Texas 75237  
(w/o enclosures)

Mr. Brad Laughlin  
Tejas Testing Technology, L.C.  
2445 McIver Lane  
Carrollton, Texas 75006  
(w/o enclosures)

Mr. Michael Shaunessy  
Bickerstaff, Heath & Smiley  
San Jacinto Center, Suite 1800  
98 San Jacinto Boulevard  
Austin, Texas 78701-4039  
(w/o enclosures)